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Criminal Procedure

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CRIMINAL PROCEDURE—GRAND JURY—WITNESS HAS A LIMITED RIGHT TO CHALLENGE LEGALITY OF A WIRETAP BY EXAMINING GOVERNMENT DOCUMENTS SUPPORTING THE COURT ORDER PERMITTING THE WIRETAP.

In re Grand Jury Investigation (John Harkins) (1980)

On March 26, 1980, John Harkins appeared before a federal grand jury and, invoking his fifth amendment right against compulsory self-incrimination,[1] refused to answer any questions other than to give his name and address.[2] The United States District Court for the Western District of Pennsylvania granted use immunity[3] for Harkins' testimony, but Harkins again refused to testify and the court scheduled a contempt

1. *See* U.S. CONST. amend. V.

2. *In re* Grand Jury Investigation (John Harkins), 624 F.2d 1160, 1162 (3d Cir. 1980).

3. *Id.* Use immunity prohibits the use of a witness's compelled testimony, and the evidence derived directly or indirectly therefrom, in any manner relating to a criminal prosecution of the witness. Kastigar v. United States, 406 U.S. 441, 453 (1972); 18 U.S.C. §§ 6002-6003 (1976). Section 6002 provides in pertinent part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to —
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> > (1) a court or grand jury of the United States, . . . and the person presiding over the proceeding communicates to the witness an order issued under [18 U.S.C. §§ 6001-6005 (1976)], the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Id. at § 6002.

Section 6003 provides that a United States district court may order an individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination when the testimony or other information from such individual may be necessary to the public interest. *Id.* § 6003.

Transactional immunity, on the other hand, is a grant of full immunity from prosecution for offenses to which the compelled testimony relates. Kastigar v. United States, 406 U.S. at 453. A typical transactional immunity statute provides immunity from "any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which [the witness] may testify, or produce evidence, documentary or otherwise." *Id.* at 451, *quoting* Act of Feb. 11, 1893, ch. 83, 27 Stat. 443 (repealed 1970). The United States Government replaced the transactional immunity approach with use immunities in 1970. 406 U.S. at 452.

hearing.[4] Harkins subsequently served subpoenas on the government, demanding information concerning the use of electronic surveillance as the basis for the grand jury's questions.[5] On April 7, 1980, the district court held a hearing, not regarding the contempt citation, but to consider a motion by the United States Attorney to quash Harkins' subpoenas.[6] The government conceded that electronic surveillance formed the basis for some of the grand jury's questions, but the district court nevertheless quashed the subpoenas.[7] Harkins' counsel then informed the court that Harkins would no longer make a general refusal to testify.[8] Before appearing before the grand jury however, Harkins moved to quash the government's subpoena for his testimony on the ground that the questions he would be asked were based on illegal wiretaps of his communications.[9] The district court found that the documents authorizing the wiretaps were facially valid and therefore ordered Harkins to testify.[10] Harkins appeared before the grand jury, but re-

4. 624 F.2d at 1162. Use immunity for Harkins' testimony had been granted pursuant to 18 U.S.C. §§ 6002-6003 (1976). 624 F.2d at 1162. For a discussion of these sections, *see* note 3 *supra*. After Harkins' second refusal to testify, the court scheduled a contempt hearing for April 7, 1980. 624 F.2d at 1162.

5. 624 F.2d at 1162. Harkins served the subpoenas on three assistant United States Attorneys and two F.B.I. agents. *Id.* The subpoenas requested, *inter alia,* information concerning:

> 1. Whether or not the information sought concerns any one particular investigation and if so:
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> a. has the government obtained any evidence via electronic surveillance;
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> b. have the speakers on any tapes made via electronic surveillance been identified;
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> c. are the alleged crimes being investigated alleged to have occurred between September 1, 1974 and February 10, 1977.

Id. at 1162-63 n.2.

6. *Id.* at 1162. The district court had scheduled a contempt hearing for April 7, 1980. *Id.* At the hearing, however, the court stated: "All we are discussing right now is a motion to [quash the] subpoena, the subpoena which you served on the United States Attorney's office. That is all we are discussing." *Id.* at 1163 n.3.

7. *Id.* at 1163. The district court was informed by the United States Attorney that Harkins had been provided with an inventory of the electronic surveillance prior to the April 7th hearing, but that no information had been provided. *Id.* at 1163 n.4. The district court quashed Harkins' subpoenas on the ground that Harkins had no right to any further information. *Id.* at 1163.

8. *Id.* at 1163. The court then allowed Harkins to return to the grand jury to answer questions. *Id.* The court, however, warned Harkins that if he should persist in his refusal to testify, a contempt hearing would be held. *Id.*

9. *Id.* At a hearing held that morning, the government responded that the questions were based on a legal wiretap authorized by a court order. *Id.* For a discussion of the exclusionary rule of the Omnibus Crime Control and Safe Streets Act, *see* notes 26-32 and accompanying text *supra.*

10. 624 F.2d at 1163. The district court examined the court order which authorized the wiretap, the Attorney General's application and an accompany-

fused to answer some of the questions posed and was subsequently held in contempt.[11]

Harkins appealed the contempt order contending, *inter alia,* that Title III of the Omnibus Crime Control and Safe Streets Act (Title III or Act)[12] requires that he be given both access to the government documents supporting the facially valid court order and a plenary hearing in order to introduce witnesses and evidence challenging the sufficiency of these documents.[13] The United States Court of Appeals for the Third Circuit[14] vacated the contempt order, *holding* that, absent a showing by the government of a need for secrecy, a witness before a grand jury who is asked questions based on information obtained through the use of electronic surveillance has a right to examine the court order authorizing the surveillance, the Attorney General's application for and affidavit supporting the court order, and the government affidavit indicating the duration of the surveillance. *In re Grand Jury Investigation (John Harkins),* 624 F.2d 1160 (3d Cir. 1980).

The grand jury functions as an investigative body which fulfills the dual purposes of issuing indictments for alleged criminal behavior and protecting citizens from unfounded criminal prosecutions.[15] Be-

ing affidavit in camera. *Id.* The court then denied Harkins' further request for a hearing on the legality of the wiretap. *Id.* Both the district court and the Third Circuit interpreted Harkins' request for a full hearing as an assertion of a right to examine the documents supporting the court order and to introduce evidence in support of the allegation that the wiretap was in fact illegal. *Id.* at 1163 n.5.

11. *Id.* at 1163-64. Harkins responded to all but five of the questions posed. *Id.* The district court held Harkins in contempt, denying his request for a contempt hearing, pursuant to 28 U.S.C. § 1826(a) (1976). Section 1826(a) provides in pertinent part:

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify . . . the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. . . .

Id. See In re Grand Jury Investigation (Bruno), 545 F.2d 385 (3d Cir. 1976).

12. 18 U.S.C. §§ 2510-2620 (1976).

13. 624 F.2d at 1164. Harkins also argued that the district court failed to provide him with a required contempt hearing in which he could raise any grounds to show that he had just cause to refuse to testify. *Id.*

14. The case was heard by Judges Adams, Van Dusen and Higginbotham. Judge Higginbotham wrote the opinion. Judge Garth dissented from the court's July 21, 1980 denial of rehearing en banc. *See* 624 F.2d at 1168-69 (Denial of Rehearing) (Garth, J., dissenting).

15. Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972); Hale v. Henkel, 201 U.S. 43, 59 (1906); Hurtado v. California, 110 U.S. 516, 556-57 (1884). *See generally, Note, Omnibus Crime Control Act of 1968 — Grand Jury Witness Who Has Been Granted Transactional Immunity May Refuse to Answer Questions Which Are Based Upon Information Derived From Unauthorized Electronic Surveillance,* 17 VIL. L. REV. 524, 525-27 (1972).

The importance of the grand jury is explicitly recognized in the United States Constitution, which provides, *inter alia:* "No person shall be held to

cause the grand jury is not a judicial forum, but an inquisitorial body,[16] it is not constrained by the rigid procedural or evidentiary rules which are employed in criminal trials.[17] This principle was recently reaffirmed by the United States Supreme Court in *United States v. Calandra*.[18] In *Calandra*, the Court held that a grand jury witness could not refuse to answer questions on the ground that the questions were based on evidence allegedly obtained from an unlawful search and seizure made in violation of the fourth amendment.[19] The Court found that the need for effective and expeditious discharge of the grand

answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend. V.

16. *See* Blair v. United States, 250 U.S. 273, 282 (1919) (witnesses before a grand jury are not entitled to take exception to the jurisdiction of the grand jury or the court over the subject matter under investigation).

17. United States v. Calandra, 414 U.S. 338, 343 (1974) (grand jury witness could not refuse to answer questions on the ground that the questions were based on evidence obtained from an unlawful search and seizure in violation of his fourth amendment rights); Blue v. United States, 384 U.S. 251 (1966) (the fact that evidence obtained in violation of the petitioner's fifth amendment privilege against self-incrimination was presented to the grand jury was not a basis for either abating the prosecution pending a new indictment, or barring it altogether); Costello v. United States, 350 U.S. 359 (1956) (facially invalid indictments cannot be challenged on the grounds that they are not supported by adequate or competent evidence); Blair v. United States, 250 U.S. 273 (1919) (grand jury witnesses may not take exception to the subject matter jurisdiction of the grand jury or the court). *See generally* Note, *supra* note 15, at 525-27.

18. 414 U.S. 338 (1974). Pursuant to a search warrant issued in connection with an extensive gambling investigation, federal agents conducted a thorough, four-hour search of respondent's place of business and seized certain evidence from his business files. *Id.* at 340. Calandra later moved for suppression and return of the seized evidence. *Id.* at 341. The district court granted Calandra's motion, finding that the search warrant had been issued without probable cause and that the search exceeded the scope of the warrant. *Id.* at 342. The district court held that the constitutional guarantee of due process allows a witness to litigate whether the grand jury's evidence was obtained in violation of the witness's fourth amendment rights. *Id.* The Sixth Circuit affirmed the district court's grant of the respondent's motion and held that the exclusionary rule may be invoked by a grand jury witness to bar questioning based on evidence obtained in an unlawful search and seizure. *Id.* The United States Supreme Court granted certiorari to determine whether a grand jury witness may refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. *Id.* at 339.

19. *Id.* at 350. Under the exclusionary rule, evidence obtained from a search and seizure in violation of the fourth amendment cannot be used in a criminal proceeding against the victim of that illegal search and seizure. Mapp. v. Ohio, 367 U.S. 643, 655 (1961); Weeks v. United States, 232 U.S. 383, 393, 398 (1914). The purpose of the rule is to deter unlawful police conduct by removing the incentive to disregard the fourth amendment right of all citizens to be secure in their persons, houses, papers and effects. Elkins v. United States, 364 U.S. 206, 217 (1960). *See* U.S. CONST. amend. IV.

The *Calandra* Court found the deterrent effect of extending the exclusionary rule to grand jury proceedings to be uncertain at best. 414 U.S. at 351. *But cf.* Silverthorne Lumber Co. v. United States (grand jury subpoenas based on illegally seized evidence held to be invalid). For a discussion of the *Calandra* Court's rationale in distinguishing *Silverthorne Lumber, see* note 63 *infra*.

jury's duties outweighed any incremental benefit which might accrue from extending the exclusionary rule to the grand jury witness.[20]

Evidence which is obtained by electronic surveillance must be excluded at trial unless the surveillance is authorized under Title III,[21] which provides that interception of a wire or oral communication will be lawful only if a detailed application for a court order approving or authorizing the interception is submitted to a judge of competent jurisdiction.[22] Title III was the result of congressional efforts to strike a balance between the competing needs for effective criminal investigations and the protection of privacy interests in wire communications.[23] In order to protect both the privacy of communications and the integrity of the courts,[24] Title III delineates, on a uniform basis, the circumstances and conditions under which the interception of wire and oral communications may be authorized.[25]

The exclusionary rule for unauthorized wiretaps is embodied in section 2515 of the Act.[26] Although the language of section 2515 would

20. 414 U.S. at 349-52. The Court was concerned that grand jury proceedings would be turned into preliminary trials on the merits. *Id.* The Court stated: "Suppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." *Id.* at 349. For a brief discussion of the exclusionary rule, *see* note 19 *supra.*

21. 18 U.S.C. §§ 2510-2520 (1976).

22. *See id.* § 2518(1). After receiving the application, if the judge determines that: 1) there is probable cause to believe that the individual has committed or will commit certain specified types of offenses; 2) there is probable cause to believe that particular communications will be obtained through the use of the wiretaps; 3) normal investigative procedures have failed, or appear either unlikely to succeed or too dangerous to attempt; and 4) there is probable cause to believe that the facilities to be wiretapped are or will be used in connection with the commission of one of the enumerated offenses, then the judge may enter an order authorizing the wiretap. *Id.* § 2518(2), (3). Each order authorizing a wiretap must specify the basic facts concerning the wiretap. *Id.* § 2518(4). Furthermore, each order has a maximum time limit of 30 days, unless an extension request is filed. *Id.* § 2518(5).

23. *See* S. REP. No. 1097, 90th Cong., 2 Sess. 66-67 *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153-63 [hereinafter cited as *Senate Report*].

24. *See Senate Report, supra* note 23, at 89, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2177.

25. *See id.* at 66, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153.

26. *See* 18 U.S.C. § 2515 (1976). Section 2515 states:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Id. The Act also provides that any person who intercepts wire or oral communications in an unauthorized manner may be subject to civil and criminal penalties. *See id.* §§ 2511, 2520.

seem to indicate that the exclusionary rule should have broad application,[27] the legislative history of the Act indicates that Congress intended section 2515 to be limited by section 2518(10)(a).[28] Section 2518(10)(a) defines when a motion to suppress may be made by an aggrieved person.[29] In so doing, it provides the remedy for the exclusionary right created by section 2515.[30] Although grand jury proceedings are specifically included in the section 2515 exclusionary rule,[31] section 2518(10)(a) does not specifically list a grand jury proceeding as a proceeding in which a motion to suppress may be made.[32]

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27. For the text of § 2515, *see* note 26 *supra*. The language of § 2515 seems to have potential for broad application because the section provides that no part of the contents, and *no* evidence derived from *any* unlawfully intercepted communication may be used before a grand jury. *See id.* For a discussion of a court holding that § 2515 should be interpreted broadly, *see* notes 33-40 and accompanying text *infra*.

28. *See* 18 U.S.C. § 2518(10)(a) (1976). Section 2518(10)(a) states:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
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> (i) the communication was unlawfully intercepted;
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> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
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> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

Id. See Senate Report, supra note 23, at 106, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2195. The Senate Report indicates that § 2518(10)(a) is to be read as limiting sections 2515 and 2517. *Id.*

29. *See* note 28 *supra*. Section 2510(11) defines an aggrieved person as a person who was a party to any intercepted wire or oral communication, or a person against whom the interception was directed. 18 U.S.C. § 2510(11) (1976). The Supreme Court has noted that only an aggrieved person may move to suppress the contents of a wire or oral communicatin intercepted in violation of the Act. Alderman v. United States, 394 U.S. 165, 175 n.9 (1969).

30. *See* 18 U.S.C. § 2518(10)(a) (1976); Senate Report, *supra* note 23, at 106, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2195. For the text of § 2518(10)(a), *see* note 28 *supra*.

31. For the text of § 2515, *see* note 26 *supra*.

32. For the text of § 2518(10)(a), *see* note 28 *supra*. It is possible to argue that section 2518 (10)(a) impliedly includes grand jury proceedings because it provides for a suppression motion in any proceeding before any authority of the United States. *Id. See In re* Grand Jury Proceedings, Harrisburg, Pennsylvania (Egan), 450 F.2d 199, 203 (3d Cir. 1971), *aff'd on other*

The interaction of sections 2515 and 2518(10)(a) was examined by the United States Supreme Court in *Gelbard v. United States*.[33] The petitioners in *Gelbard* had been incarcerated pursuant to the Recalcitrant Witness Act,[34] for refusing to answer grand jury questions which were based on evidence obtained from illegal wiretaps.[35] The Court held that where interrogation is based upon *illegal* interception of the witness' communications, the witness may invoke section 2515 as a defense to contempt charges brought on the basis of his refusal to obey

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grounds sub nom. Gelbard v. United States, 408 U.S. 41 (1972). For a discussion of *In re Egan*, see note 33 *infra*.

The Senate Report which accompanied the Act however, explained the omission as follows:

> Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. There is no intent to change this general rule. It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding.

Senate Report, supra note 23, at 106, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2195 (citation omitted).

33. 408 U.S. 41 (1972), *rev'g* 443 F.2d 837 (9th Cir. 1971). The Ninth Circuit had decided that grand jury witnesses were not entitled to use § 2515 as a defense in a contempt proceeding. 443 F.2d at 838. The government, pursuant to a court approved wiretap, had intercepted conversations between an alleged bookmaker and the petitioners. 408 U.S. at 44. The petitioners appeared before a federal grand jury which had been convened to investigate possible violations of federal gambling laws. *Id.* The petitioners refused to answer any questions until they were afforded an opportunity to litigate the legality of the interceptions. *Id.* The petitioners were held in contempt by the District Court for the Central District of California and were incarcerated pursuant to the Recalcitrant Witness Act, 28 U.S.C. § 1826(a) (1976). 408 U.S. 44-45. For the pertinent text of the Recalcitrant Witness Act, *see* note 11 *supra*.

The Third Circuit, adopting the contrary rule, had held that witnesses were entitled to use § 2515 as a defense in a contempt proceeding in certain circumstances. *In re* Grand Jury Proceedings, Harrisburg, Pennsylvania (Egan), 450 F.2d 199 (3d Cir. 1971), *aff'd on other grounds sub nom.* Gelbard v. United States, 408 U.S. 41 (1972). In *Egan*, the respondents were granted transactional immunity in return for their testimony. 450 F.2d at 200. The respondents, however, refused to answer the grand jury's questions on the ground that the questions were based on illegal wiretaps. *Id.* at 201. Following a hearing, the petitioners were held in contempt and sentenced to incarceration. *Id.* On appeal, the Third Circuit reversed. *Id.* at 221. The Supreme Court granted certiorari in both cases to resolve the contrary decisions of the Third and Ninth Circuits. 408 U.S. at 44.

34. 408 U.S. at 44-47. *See* 28 U.S.C. § 1826(a) (1976). For the text of § 1826(a), *see* note 11 *supra*.

35. 408 U.S. at 44-47. The majority decided the case based upon the assumption that the communications were not intercepted in accordance with the provisions of Title III of the Act. *Id.* at 47.

a court order to testify before the grand jury.[36] The Court based its decision on a broad reading of the exclusionary rule provided by section 2515[37] and on the belief that a contempt hearing for refusal to testify is a proceeding separate and distinct from a grand jury proceeding.[38]

The *Gelbard* majority specifically left undecided the issue of whether the grand jury witnesses would have been entitled to invoke a section 2515 defense in a contempt proceeding, if the interception of the conversation had been pursuant to a court order.[39] Since *Gelbard,* the

36. *Id.*

37. *Id.* at 47-52. The Court found that protection of privacy was an overriding congressional concern in the passage of Title III of the Act and that § 2515 was designed to secure the privacy rights of the individual. *Id.* at 48. The Court declared that to order a grand jury witness to testify regarding evidence barred by the unequivocal terms of § 2515 would thwart the congressional objective of protecting individual privacy and would entangle the courts in the illegal acts of government agents. *Id.* at 50-51. The Court concluded: "In sum, Congress simply cannot be understood to have sanctioned orders to produce evidence excluded from grand jury proceedings by § 2515." *Id.*

38. *Id.* at 59-61. The Court distinguished the situation of a grand jury witness who has refused to testify and attempts to defend a subsequent charge of contempt from that of a defendant who moves to have his indictment dismissed because the government presented illegally acquired evidence to the grand jury. *Id.* at 60. Hence, the Court did not accept the arguments that the Senate report expressed the view that a grand jury witness should be foreclosed from raising the § 2515 defense in a contempt proceeding for refusing to testify. *Id.* For the text of the Senate Report to which the Court was referring, *see* note 32 *supra.*

Justice Brennan delivered the opinion of the Court, in which Justices Douglas, Stewart, White, and Marshall joined. 408 U.S. at 41. Justice Douglas filed a concurring opinion declaring his belief that the fourth amendment shields a grand jury witness from any question which is based upon information acquired through searches which invade his own constitutionally protected privacy. *Id.* at 62 (Douglas, J., concurring). Justice White also filed a concurring opinion, stating that when the United States has intercepted communications without obtaining a required warrant it is appropriate not to require the grand jury witness to answer. *Id.* at 70 (White, J., concurring). Justice Rehnquist, joined by Chief Justice Burger and Justices Blackmun and Powell, filed a dissenting opinion contending that the right of a grand jury witness to refuse to testify should not be expanded in light of the historical role of the grand jury and the legislative history of the Act. *Id.* at 71-91. (Rehnquist, J., dissenting).

39. 408 U.S. at 61 n.22. In his concurring opinion, Justice White indicated that the Court might have reached a different conclusion if the interception had been authorized by court order. *Id.* at 69 (White, J., concurring). Justice White stated:

> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in pro tracted interruption of grand jury proceedings . . . and, in any event, the deterrent value of excluding the evidence will be marginal at best.

courts of appeals have developed two divergent approaches in attempting to resolve this issue.[40]

The approach developed by the Second Circuit in *In re Persico*,[41] posits that the seemingly inconsistent policy determinations of the Act which require both the exclusion of illegally acquired evidence,[42] and the maintenance of unimpeded grand jury proceedings,[43] can be reconciled by interpreting the statute to require exclusion only when it is clear that the surveillance was illegal and a suppression hearing is therefore unnecessary.[44] Thus, the *Persico* court held that a suppression hearing to test the legality of electronic surveillance need not be given in contempt proceedings initiated after a grand jury witness was granted use immunity but refused to answer questions on the ground that they were the products of illegal electronic surveillance.[45] The

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40. *See In re* Special February, 1977 Grand Jury (Pavone), 570 F.2d 674, 678 (7th Cir. 1978), *cert. denied,* 437 U.S. 904 (1978) (in deciding the appeal of a grand jury witness who was adjudged in contempt, the court reviewed the holdings of the other courts of appeals).

Compare In re Special February, 1977 Grand Jury (Pavone), 570 F.2d 674 (7th Cir. 1977), *cert. denied,* 437 U.S. 904 (1978); United States v. Morales, 566 F.2d 402 (2d Cir. 1977); *In re* Gordon, 534 F.2d 197 (9th Cir. 1976); *In re* Millow, 529 F.2d 770 (2d Cir. 1976); *In re* Grand Jury Proceedings (Worobyzt), 522 F.2d 196 (5th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976); United States v. Stevens, 510 F.2d 1101 (5th Cir. 1975); Droback v. United States, 509 F.2d 625 (9th Cir. 1974), *cert. denied,* 421 U.S. 964 (1975) *with In re* Grand Jury Proceedings (Katsouros), 613 F.2d 1171 (D.C. Cir. 1979); Melickian v. United States, 547 F.2d 416 (8th Cir.), *cert. denied,* 430 U.S. 986 (1977); *In re Mintzer,* 511 F.2d 471 (1st Cir. 1974); *In re* Lochiatto, 497 F.2d 803 (1st Cir. 1974).

For a discussion of the two approaches, *see* notes 41-49 and accompanying text *infra.*

41. 491 F.2d 1156 (2d Cir.), *cert. denied,* 419 U.S. 924 (1974). In *Persico,* a grand jury witness who had been granted use and derivative use immunity nonetheless refused to testify, contending that a particular question was the product of illegal electronic surveillance. 491 F.2d at 1158. The government conceded that this question was derived from electronic surveillance, but argued that the surveillance had been conducted pursuant to three valid court orders. *Id.* The lower court judge inspected the court orders in camera, found them to be proper, and refused to grant appellant's motion that a suppression hearing be held to test the legality of the surveillance. *Id.*

42. *See* note 26 *supra.*

43. *See* note 28 *supra.*

44. 491 F.2d at 1161. The court reasoned that if the illegality of electronic surveillance can only be established through a plenary suppression hearing, then the legislative aim of maintaining unimpeded grand jury proceedings would be frustrated. *Id.* at 1161-62.

For examples of when it is clear that a suppression hearing is unnecessary, *see* text accompanying note 46 *infra.*

45. 491 F.2d at 1162. The court was not persuaded by the appellant's argument, based on legislative history, that a contempt proceeding is a proceeding in "another context" and, therefore, that the general proscription against suppression hearings in grand jury proceedings does not apply to contempt proceedings arising out of a witness's refusal to answer a grand

court further held that refusal to answer would only be permissible if there was: 1) an absence of a necessary court order, or 2) a concession from the government that the surveillance was not in conformity with the statutory requirements, or 3) a prior adjudication that the surveillance was unlawful.[46]

The First Circuit in *In re Lochiatto*,[47] however, declared that in interpreting sections 2515 and 2518(10)(a), the court must attempt to reconcile the objectives of minimizing delay in grand jury proceedings, securing the government's secrecy interests in sensitive materials, and protecting the defendant's right to assert the defenses which Congress had established in the Act.[48] The court held, therefore, that there should be an opportunity for inspection of the authorized application of the Attorney General or his designate, the affidavits in support of the court order, the court order itself, and an affidavit submitted by the government indicating the length of time the surveillance was conducted.[49]

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jury's questions. *Id.* at 1161-62; *see Senate Report, supra* note 23, at 106, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2195. The Second Circuit declared that the appellant's argument was unrealistic because the contempt mechanism is so intimately connected with the grand jury proceedings as to be a part of them. 491 F.2d at 1162. The court stated that to allow a recalcitrant grand jury witness to expand the breadth of inquiry which is permissible in a contemporaneous contempt proceeding would impede the smooth functioning of the grand jury. *Id.*

46. 491 F.2d at 1161. The Second Circuit has reaffirmed its position in subsequent cases. *See, e.g.*, United States v. Morales, 566 F.2d 402 (2d Cir. 1977); *In re* Millow, 529 F.2d 770 (2d Cir. 1976). For a review of the courts, which have adopted this approach, *see* note 40 *supra.*

47. 497 F.2d 803 (1st Cir. 1974). In *Lochiatto,* grand jury witnesses, who had been granted use immunity, were held in contempt after refusing to answer the questions of a special grand jury investigating the making or financing of extortionate credit transactions. *Id.* at 804. For a discussion of use immunity, *see* note 3 *supra.* The government asserted that the wiretaps were authorized by court order. 497 F.2d at 804.

The defendants contended that, at a minimum, they had a right to in camera review by the court of the materials used to support the court order. *Id.* at 805. The defendants contended that they also had the right to examine the court orders, the government affidavits and materials submitted to support the order, and any products of the surveillance or reports to the court. *Id.* at 805. In addition, the defendants requested a plenary evidentiary hearing to test the legality of the surveillance. *Id.* The district court refused to examine the court order or any of the government documents supporting that order in the case of two of the grand jury witnesses. *Id.* In the case of the other witness, the court denied discovery but reviewed in camera the court orders authorizing the wiretaps and found them to be facially valid. *Id.*

48. 497 F.2d at 807.

49. *Id.* at 808. The court read the Act as "giving a witness the right to avoid a Hobson's choice between jail and testimony by mounting at least a limited challenge which, like a declaratory judgment, can clarify his rights before he risks sanction." *Id.* at 807. The First Circuit has since reaffirmed the *Lochiatto* decision. *See In re* Mintzer, 511 F.2d 471 (1st Cir. 1974). For a

Against this background, the Third Circuit began its analysis in *Harkins* by examining the language of sections 2515 and 2518(10)(a).[50] The court first noted the omission of the grand jury proceeding from those proceedings enumerated in section 2518(10)(a).[51] The court examined the legislative history of section 2518(10)(a) and concluded that the procedures available for challenging the use of evidence in grand jury proceedings are limited because of special solicitude for the informal nature of the grand jury proceeding.[52] The court noted that the Supreme Court in *Gelbard* had partially resolved the tension between sections 2515 and 2518(10)(a) by allowing a recalcitrant witness to defend against a charge of contempt on the ground that the questions were based on a presumptively illegal wiretap.[53]

The Third Circuit next examined the decisions of the Second Circuit in *Persico*[54] and the First Circuit in *Lochiatto*.[55] The Third Circuit, adopting the approach of *Lochiatto* as a pragmatic accommodation of the competing interests in the case,[56] concluded that Harkins should be granted an opportunity to inspect the documents supporting the court ordered wiretap.[57] The holding of the court was based on its belief that a right of access to a court order and supporting materials, when the government can show no secrecy interest,[58] should pro-

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list of the courts of appeals which have adopted this approach, *see* note 40 *supra.*

50. 624 F.2d at 1164. For the text of § 2515, *see* note 26 *supra.* For the text of § 2518(10)(a), *see* note 28 *supra.*

51. 624 F.2d at 1164-65. The Third Circuit also noted the definition of "aggrieved person" provided by the Act. *Id.* For the text of this definition, *see* note 29 *supra.*

52. 624 F.2d at 1165, *citing Senate Report, supra* note 23, at 106, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2195.

53. 624 F.2d at 1165. For a discussion of *Gelbard, see* notes 33-39 and accompanying text *supra.* The Third Circuit opined that the ambiguity of the statutory language, as well as the pragmatic approach suggested by Justice White's concurring opinion in *Gelbard,* have led to the conflict among the courts of appeals as to the procedural rights of grand jury witnesses. 624 F.2d at 1166. *See* note 40 and accompanying text *supra.*

54. 624 F.2d at 1166. For a discussion of *Persico, see* notes 41-46 and accompanying text *supra.*

55. 624 F.2d at 1166. For a discussion of *Lochiatto, see* notes 47-49 and accompanying text *supra.*

56. 624 F.2d at 1166. The court defined three interests that must be accommodated: 1) the defendant's interest under the statute in not answering questions based on illegal wiretaps, 2) the government's interest in effective grand jury investigations, and 3) the government's further interest in protecting the secrecy of sensitive information contained in the materials supporting the wiretap or in the logs of the wiretaps. *Id.*

57. *Id.*

58. The Third Circuit did not articulate any criteria with which to evaluate when the government's secrecy interest would be sufficiently strong so as to bar a witness' right of access to the court order and the supporting mate-

vide an important adversarial check and deterrent against the use of illegal wiretaps, without undermining governmental concerns.[59] The Third Circuit further opined that the right of access to the government's supporting documents would not allow recalcitrant witnesses to unduly lengthen the grand jury proceedings.[60] Thus, finding that Harkins should have been allowed to examine the court order and the supporting documents,[61] and been given a contempt hearing,[62] the Third Circuit vacated the district court's order holding Harkins in contempt and remanded for proceedings consistent with its opinion.[63]

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rials. *Id.* at 1166-68. However, in *Lochiatto,* the First Circuit also discussed the secrecy interest of the government, stating: "There is often sensitive material contained in the reports and affidavits; there is a high premium placed on secrecy, often to protect the witnesses . . . . " 497 F.2d at 803. For a discussion of *Lochiatto, see* notes 47-49 and accompanying text *supra.* In view of the Third Circuit's explicit reliance on *Lochiatto,* it is submitted that, at a minimum, the government's secrecy interest should be paramount when dissemination of the court order or the supporting materials could endanger any of the witnesses to the grand jury proceedings.

59. 624 F.2d at 1166. The Third Circuit noted a statement by the Supreme Court in *Gelbard* that § 2515 also serves the function of protecting the integrity of the court by ensuring that the courts do not become partners to illegal conduct. *Id.* at 1166-67. For a discussion of *Gelbard, see* notes 33-39 and accompanying text *supra.*

The Third Circuit stated that limiting examination of the materials supporting the wiretap to an in camera examination by the judge would deprive the witness of any real opportunity to assert his rights under the statute. 624 F.2d at 1167. The possibility would exist that a witness could be imprisoned for refusing to answer questions based on an illegal wiretap, the legality of which was untested by adversarial scrutiny. *Id.*

60. 624 F.2d at 1167. The court noted that the only cause of delay would be the ex parte hearing to suppress sensitive evidence and that the government could complete this as soon at it wished to. *Id.* If the government raised a secrecy-of-information objection to the witness review of the materials, the court declared that the proper procedure was for the judge to review the materials in camera. *Id.* at 1167 n.10.

The court was careful to note, however, that the witness should not have a right to introduce his own evidence to test the sufficiency of the government's documents. *Id.* at 1167. The court postulated that such a suppression hearing could cause unmanageable delay because witnesses might ask for a continuance to gather and present evidence. *Id.*

61. *See* note 57 and accompanying text *supra.*

62. The Third Circuit found that Harkins was required to have an opportunity for a contempt hearing. 624 F.2d at 1168. *See In re* Grand Jury Investigation (Bruno), 545 F.2d 385 (3d Cir. 1976). In *Bruno,* the court held that the language of the Recalcitrant Witness Act affords the witness a right to a reasonable time to prepare for the contempt proceeding and an opportunity to present all defenses properly available to him. *Id.* at 388. *See* 28 U.S.C. § 1826(a) (1976); note 11 *supra.*

63. 624 F.2d at 1167. In his dissent from a denial of rehearing en banc, Judge Garth analogized the issue presented in the instant case to the constitutional question of grand jury use of evidence derived from unlawful searches and seizures. 624 F.2d at 1168-69 (denial of rehearing) (Garth, J., dissenting). *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). In *Silverthorne Lumber,* the Court held that grand jury subpoenas which were based

It is submitted that the *Harkins* decision represents a pragmatic balancing of the defendant's interest in not answering questions based on illegal wiretaps and the government's interest in effective grand jury investigations.[64] By asserting that the government's documents must survive the crucible of some minimum degree of adversarial scrutiny,[65] the Third Circuit protects the integrity of the court and the privacy rights of grand jury witnesses more effectively than does the Second Circuit approach.[66] In so doing, the Third Circuit's decision is consonant with the edict of *Gelbard,* which asserts the primacy of privacy considerations in the passage of the Act.[67]

It is further submitted that the Third Circuit correctly rejected the rationale of those circuits which have adopted the Second Circuit's position in *In re Persico.*[68] The *Persico* analysis, that the contempt mechanism employed to coerce testimony is so intimately connected with the grand jury proceeding as to really be a part of those proceedings,[69] is difficult to reconcile with *Gelbard* since the Supreme Court based the *Gelbard* decision, in part, on the premise that con-

on illegally seized evidence were invalid. *Id.* at 391-92. In *United States v. Calandra,* the Court held that a witness summoned to appear before a grand jury could not refuse to answer questions on the grounds that they were based on a search and seizure in violation of the fourth amendment. 414 U.S. at 354-55. *See* notes 18-20 and accompanying text *supra.* The *Calandra* court distinguished *Silverthorne,* by stating that in *Silverthorne,* prior to the issuance of the subpoenas, there had been an adjudication that the search and seizure upon which the subpoenas were based were illegal. 414 U.S. at 352 n.8. In *Calandra,* it would have been necessary to interrupt the grand jury proceedings to determine the legality of the search. *Id.* Judge Garth stated that, by analogy, there was no reason to allow a witness who could not be harmed to litigate the legality of a wiretap as long as the questions the witness is asked to answer are not derived from obviously unlawful electronic surveillance. 624 F.2d at 1168 (denial of rehearing) (Garth, J., dissenting).

64. *See* text accompanying note 23 *supra.*

65. *See* text accompanying note 57 *supra.*

66. Under the Second Circuit's approach, the grand jury witness is not afforded any opportunity to examine the documents supporting the authorization of the wiretap. *See* text accompanying note 46 *supra.* By contrast, under the Third Circuit's approach, the witness is able to examine the court order authorizing the surveillance, the application for an affidavit supporting the court order, and the government affidavit indicating the length of time of the surveillance. *See* text accompanying note 57 *supra.* It is submitted that the Third Circuit's decision, enabling the witness to make a determination that the government documents are facially valid and that the government complied with the procedural requirements of the Act, affords a grand jury witness a better opportunity to assert his rights under the Act. By asserting his rights, the grand jury witness will also help ensure that the courts do not become partners in the illegal acts of Government agents. For a discussion of the *Gelbard* Court's assertion of this interest, *see* note 37 *supra.*

67. For a discussion of the Court's rationale in *Gelbard, see* notes 37-38 and accompanying text *supra.*

68. *See* notes 45-46 and accompanying text *supra.*

69. *See* note 45 and accompanying text *supra.*

tempt hearings are proceedings which are separate and distinct from grand jury proceedings.[70]

It is further suggested, however, that in striking a balance between the competing interests in this case,[71] the Third Circuit should have afforded the grand jury witness a right to introduce evidence testing the factual sufficiency of the evidence contained in the government documents supporting the wiretaps.[72] Since the Third Circuit has held that the language of the Recalcitrant Witness Act [73] affords the witness a reasonable time to prepare for a contempt hearing and an opportunity to present *all* defenses properly available to him,[74] it is submitted that the grand jury witness should be afforded, at least to the extent that it will not unduly delay the grand jury proceedings, an opportunity to present evidence to establish the defense that the government's electronic surveillance violated the Act.[75]

Until the Supreme Court provides a definitive answer, the court of appeals will remain divided on whether, and to what extent, a grand jury witness may challenge the legality of a facially valid court authorized wiretap.[76] In attempting to resolve this question, it is suggested that the Supreme Court should consider the possibility of allowing the grand jury witness an opportunity to introduce evidence to establish

70. *See* note 38 and accompanying text *supra.*

71. *See* note 23 and accompanying text *supra.*

72. The Third Circuit stated that a witness had no such right to introduce his own evidence. *See* 624 F.2d at 1167; note 60 *supra.*

73. *See* note 11 and accompanying text *supra.*

74. *See In re* Grand Jury Investigations (Bruno), 545 F.2d 385, 388 (3d Cir. 1976).

75. It is submitted that if the amount of time granted a witness to produce evidence is limited to the reasonable time period which he already has to prepare for the contempt hearing, then no undue delay in the grand jury proceedings should occur. Even a witness's appeal from an adverse decision of the district court in such a case should not unduly delay the grand jury proceedings, because the appeal must be disposed of within thirty days. *See* 28 U.S.C. § 1826(b) (1976); *In re* Grand Jury Proceedings (Katsouros), 613 F.2d 1171, 1175 n.5 (D.C. Cir. 1979). Admittedly, allowing a witness a limited amount of time to gather evidence will impose a greater burden on the government to ensure the legality of their wiretapping operations than was imposed by the *Lochiatto* court. *See* notes 47-49 and accompanying text *supra.* Other courts have also found it desirable, however, to impose more stringent burdens on the government. *See* Melickian v. United States, 547 F.2d 416, 420 (8th Cir.), *cert. denied,* 430 U.S. 986 (1977) (the government must make a minimal showing of the necessity to avoid delay or preserve secrecy before the witness' right to inspect the documents can be denied); *In re* Mintzer, 511 F.2d 471, 473 (1st Cir. 1974) (the government must swear by affidavit that it did not conceal the use of any wiretaps from the witness, or use any of the taps which the court determines to be illegal, in the formulation of questions to the witness). For a discussion of illegality of surveillance as a defense to a refusal to testify, *see* note 36 and accompanying text *supra.*

76. The Supreme Court has on four occasions declined to grant certiorari to cases addressing this issue. *See* note 40 *supra.*

that the government's surveillance was unlawful. In the absence of an opportunity to present evidence, it is further suggested that the Third Circuit's approach represents the proper standard to follow, because it best balances the need for efficient government investigations with the rights of the grand jury witness under the Act.

Thomas J. Hopkins

CRIMINAL PROCEDURE — SELF-INCRIMINATION — MIRANDA WARNINGS ARE NOT A PREREQUISITE TO THE ADMISSION OF EVIDENCE GIVEN BY AN ARMED SUSPECT WHO HAS BARRICADED HIMSELF AWAY FROM THE DIRECT AND IMMEDIATE CONTROL OF THE POLICE.

United States v. Mesa (1980)

Upon being informed that Rigoberto Mesa had shot his common-law wife and daughter on January 28, 1980,[1] agents of the Federal Bureau of Investigation (FBI) searched for and located Mesa, who had barricaded himself in a motel room.[2] Following Mesa's refusal to respond to requests to surrender,[3] the FBI's hostage negotiator for the area (Agent) was called in.[4] The Agent talked with Mesa for approximately three and one-half hours in a taped conversation[5] in which Mesa made several inculpatory statements regarding the events surrounding the shooting.[6] The Agent primarily adopted the role of a

1. United States v. Mesa, 487 F. Supp. 562, 563 (D.N.J.), *rev'd*, 638 F.2d 582 (3d Cir. 1980). Both victims survived and later that day informed the FBI of the shooting. 487 F. Supp. at 563. While it is not entirely clear from either opinion, it would appear that the shooting took place on a federal military reservation, thus involving the FBI in the investigation. *See* 487 F. Supp. at 563 (defendant charged under 28 U.S.C. § 113 (1976) governing assaults on federal reservations); *id.* at 564 (FBI accompanied by military police during investigation).

2. 487 F. Supp. at 563. At approximately 2:00 p.m. on January 29, three FBI agents went to the El Sombrero Motel in Browns Mills, New Jersey and learned that Mesa had barricaded himself in his room sometime before 10:00 a.m. that day. *Id.* The agents then evacuated the rooms on each side of Mesa's room and blocked off traffic in the area, thus preventing ingress and egress to the motel. *Id.* at 563-64. In less than 20 minutes, nearly 30 law enforcement officials had arrived on the scene and surrounded the motel. *Id.* at 564.

3. *Id.* at 564. The agents, using a bullhorn, stated: "Mr. Mesa, this is the FBI, we have a warrant for your arrest, come out with your hands raised." *Id.* When Mesa did not respond, the statement was repeated between 10 and 12 times over the course of approximately one hour. *Id.*

4. *Id.* Since the FBI agents on the scene believed Mesa to be armed and were concerned that he might have taken hostages, they deemed it inadvisable to forcibly take Mesa into their custody and called in the hostage negotiator. *Id.*

5. *Id.* at 563. The tape recording of the beginning five percent of the conversation was missing and the only evidence of its contents was the Agent's testimony that he began the conversation by introducing himself, identifying himself as an FBI agent specializing in hostage negotiation, and telling Mesa that he was there to help him. *Id.* at 565.

6. *Id.* at 563. The court did not elaborate on the specific inculpatory statements made by Mesa. *See id.* at 563-68. During the conversation, Mesa also discussed other events of his life, such as his experiences in Vietnam, his

listener as he attempted to establish a relationship of trust with Mesa.[7] After he surrendered peacefully, Mesa was given the warnings [8] required by *Miranda v. Arizona*.[9]

Since Mesa was not given his *Miranda* warnings during his conversation with the Agent,[10] he moved to suppress the contents of the taped conversation at his trial.[11] The district court granted the motion

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relationship with his family during his childhood in Cuba, and his relationship with his common-law wife and children. *Id.* at 565.

7. *Id.* at 564-65. The Agent's role, for the most part, consisted of passive listening, as he had been informed that Mesa had been under psychiatric care and might have suicidal tendencies. *Id.* at 564. The Agent stated that his function and purpose was "to defuse a volatile situation in which lives might have been lost." *Id.* at 564-65. Therefore, he made supportive comments which seemed to be designed to keep Mesa talking in order to establish the relationship of trust. *Id.*

8. *Id.* at 565. After he had surrendered, Mesa thanked the Agent for listening to him and stated that he would have killed himself had it not been for the Agent. 638 F.2d at 584.

Prior to the start of the phone conversation, Mesa had passed three notes under the door of his motel room. 487 F. Supp. at 564. Mesa indicated in the notes that he would eventually surrender, but that he needed more time. *Id.* He also stated that he needed to see a psychiatrist because an "inner voice" was bothering him. *Id.*

9. 384 U.S. 436 (1966). For the required warnings, *see* note 17 *infra*.

10. 487 F. Supp. at 563.

11. *Id.* at 563. The defense moved for the suppression of the evidence pursuant to 18 U.S.C. § 3501 (1976). 487 F. Supp. at 563. A suppression hearing was then held in order to ascertain the facts surrounding the conversation between Mesa and the Agent. *Id.*

Section 3501 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States . . . a confession, . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. . . .
>
> (b) The trial judge, in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including . . . (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; . . .
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> . . . .
>
> (d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

18 U.S.C. § 3501 (1976).

to suppress,[12] finding that the conversation constituted a "custodial interrogation" [13] within the meaning of *Miranda*.[14]

On an interlocutory appeal, the United States Court of Appeals for the Third Circuit [15] reversed, *holding* that an armed suspect who is possibly holding hostages and who barricades himself away from the direct and immediate control of the police is not in custody, and, therefore, *Miranda* warnings need not be given as a prerequisite to the admission of his statements into evidence at trial. *United States v. Mesa*, 638 F.2d 582 (3d Cir. 1980).

In *Miranda*,[16] the United States Supreme Court ruled that when a suspect is confronted by law enforcement officers, he must be given certain warnings in order to protect his fifth amendment privilege against compelled self-incrimination.[17] The Court stated that the privilege can

12. 487 F. Supp. at 563. The district court held that although the Agent's main purpose was to resolve the situation, he also had a secondary purpose of gathering information concerning Mesa's involvement in the criminal assault with which he was subsequently charged. *Id.* at 565.

13. *Id.* at 566. The district court held that since Mesa could not have had a reasonable expectation of being allowed to go free, or even of being able to escape, he was in custody for *Miranda* purposes. *Id.* For a further discussion of the definition and scope of the term "custodial interrogation," *see* notes 19-37 and accompanying text *infra*.

14. 487 F. Supp. at 566. For a further discussion of *Miranda*, *see* notes 16-25 and accompanying text *infra*.

15. The case was heard by Chief Judge Seitz, Judge Adams, and Judge Charles R. Weiner of the United States District Court for the Eastern District of Pennsylvania, sitting by designation. Chief Judge Seitz wrote the opinion of the court, Judge Adams filed a concurring opinion, and Judge Weiner dissented.

16. 384 U.S. 436 (1966), *noted in* 12 VILL. L. REV. 198 (1966). *Miranda* consolidated four separate cases dealing with the fifth amendment: Miranda v. Arizona, 384 U.S. 436 (1966) (defendant was arrested and taken to a special interrogation room, where he later confessed); Vignera v. New York, 384 U.S. 436 (1966) (defendant was picked up in connection with a robbery and taken to police headquarters, where he made an oral confession; he was later formally arrested and taken to another police station, where he signed an inculpatory statement); Westover v. United States, 384 U.S. 436 (1966) (defendant was arrested and interrogated on the night of the arrest, the next morning, and the next afternoon, at which time he signed a confession following a two and one-half hour session); California v. Stewart, 384 U.S. 436 (1966) (defendant was arrested, held for five days, and interrogated on nine separate occasions before he signed an inculpatory statement). 384 U.S. at 491-99. In each case the Court held that the suspect's fifth amendment rights had been violated. *Id.*

For a general discussion of the issues involved in *Miranda*, *see Interrogation of Criminal Defendants — some views on* Miranda v. Arizona, 35 FORDHAM L. REV. 169 (1966) (due to the controversy caused by the *Miranda* decision, the Editorial Board of the Fordham Law Review invited eight scholars to express their views on the case).

17. 384 U.S. at 479. *Miranda* requires that the suspect:

> be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if

only be protected when the suspect is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." [18] After concluding that the modern methods of interrogation often compel a suspect to speak,[19] the *Miranda* Court held that the warnings must be given to any person who is the subject of a "custodial interrogation." [20] The Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." [21] If the suspect is not given the warnings prior

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> he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id.

The fifth amendment requires that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

18. 384 U.S. at 460, *quoting* Malloy v. Hogan, 378 U.S. 1, 8 (1964). The Court stated that "our accusatory system of criminal justice demands that the government, when seeking to punish an individual, produce the evidence against him by its own independent labors, rather than by the cruel, simple, expedient of compelling it from his own mouth." 384 U.S. at 460, *citing* Chambers v. Florida, 390 U.S. 227, 235-38 (1940).

19. 384 U.S. at 461. The Court stated that "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak." *Id.*

In discussing interrogation techniques, the *Miranda* Court did not specifically define what it meant by "interrogation," but rather simply viewed it as questioning initiated by law enforcement officials in a setting in which the suspect is cut off from the outside world. *Id.* at 445. The term was recently defined, however, in Rhode Island v. Innis, 446 U.S. 291 (1980), where the Court held that:

> [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Id. at 300-01 (footnotes omitted).

The Court also stated that:

> [A]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect.

Id. at 302 n.8.

20. 384 U.S. at 444.

21. *Id.* The Court found that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.* at 455 (footnote omitted). In each of the four cases, the Court held that the interrogation environment was "created for no purpose other than to subjugate the individual to the will of his examiner." *Id.* at 457. The significance of having a suspect in custody is indicated by the fact that police manuals which discuss interrogation techniques stress the importance of isolating the suspect in unfamiliar surroundings and the importance of patience and perseverance in questioning on the part of the interrogator. *Id.* at

to such questioning, then any statements stemming from the custodial interrogation are deemed to be compelled in violation of his fifth amendment rights and, thus, are inadmissible.[22]

While the Court attempted to protect suspects' fifth amendment privilege against compelled self-incrimination, it also stated that its decision was not intended to hamper the traditional function of police officers in investigating crime.[23] Consequently, the warnings are not required in situations where an officer asks general questions regarding what has just occurred upon his arrival at the scene of the crime,[24] since

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449-51. *See generally* F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1967). Therefore, the Court noted, unless a suspect is properly informed of his constitutional rights, his will to resist the inherently compelling pressures will be undermined and he will be compelled to speak where he would not otherwise do so freely. 384 U.S. at 467.

For a discussion of *Miranda* and "custodial interrogations," *see* N. SOBEL, THE NEW CONFESSION STANDARDS — MIRANDA V. ARIZONA (1966); Graham, *What Is "Custodial Interrogation?": California's Anticipatory Application of* Miranda v. Arizona, 14 U.C.L.A. L. REV. 59 (1967); Smith, *The Threshold Question in Applying* Miranda: *What Constitutes Custodial Interrogation,* 25 S.C. L. REV. 699 (1974).

22. 384 U.S. at 444. The warnings are necessary procedural safeguards, designed to inform the accused of his right to silence and to assure him a continuous opportunity to exercise it. *Id.* The *Miranda* Court did mention that other fully effective means could be used to inform the defendant of his constitutional rights. *Id.* For a discussion of what the *Miranda* rights require, *see* note 17 *supra.*

Once the defendant is made aware of his rights, he may waive them, provided the waiver is made voluntarily, knowingly, and intelligently. 384 U.S. at 444. The heavy burden of proving such a waiver rests on the government. *Id.* at 475, *citing* Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964); Johnson v. Zerbst, 304 U.S. 458 (1938).

Regardless of whether *Miranda* warnings are given, any statement must be scrutinized for voluntariness before it can be admitted into evidence. Rogers v. Richmond, 365 U.S. 534, 540 (1961). If a defendant's statements are not voluntary, then their admission would violate the due process rights guaranteed the defendant under the fifth and fourteenth amendments. *Id.* at 541. In deciding a voluntariness claim, the court must focus on "whether the behavior of the . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . . ." *Id.* at 544.

23. 384 U.S. at 477. *See* notes 17-18 and accompanying text *supra.*

24. 384 U.S. at 477. The Court stated that "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." *Id.* For the application of the "on-the-scene" exception in the courts of appeals, *see, e.g.,* United States v. Quinones-Gonzalez, 452 F.2d 964, 965 (10th Cir. 1971) (*Miranda* not applicable where police checked the license plate of defendants' car while defendants were being treated at a hospital for heroin withdrawal); Utsler v. Erickson, 440 F.2d 140, 143 (8th Cir.), *cert. denied,* 404 U.S. 956 (1971) (*Miranda* not applicable when the police ask preliminary questions of identification and questions concerning the recent whereabouts of people under suspicion while investigating a probable offense); United States v. Pridgen, 435 F.2d 152, 153 (5th Cir. 1970) (*Miranda* not applicable to police questioning of a suspect under suspicious circumstances); United States v. Tobin, 429 F.2d 1261, 1263 (8th Cir. 1970) (*Miranda* not applicable to questioning of defendant during a routine traffic stop); United States v. Robertson, 425 F.2d

the compelling atmosphere inherent in an in-custody interrogation is not necessarily present.[25]

Following *Miranda,* courts had difficulty defining the scope of the term "custodial interrogation." [26] The Supreme Court then attempted to clarify this issue in a series of cases.[27] In *Mathis v. United States,*[28] the Court found that the reason for the suspect's custody was unimportant,[29] and held that *Miranda* applies to the interrogation of a suspect concerning one crime while he is already in prison for committing another.[30] In *Orozco v. Texas,*[31] the Court stated that "custody" is not restricted to interrogation in a police station or jail, and held that *Miranda* is applicable to an interrogation in a suspect's bedroom.[32]

1386, 1387-88 (5th Cir.), *cert. denied,* 440 U.S. 867 (1970) (*Miranda* not applicable to questions regarding the ownership of the car which the defendant is driving when the car is believed to be stolen); United States v. Thomas, 396 F.2d 310, 314 (2d Cir. 1968) (*Miranda* not applicable when there is an on-the-scene investigation when defendants are not restrained, are questioned on a public street, and are neither frisked nor searched on the street); Sciberras v. United States, 380 F.2d 732, 734 (10th Cir. 1967) (*Miranda* not applicable to asking defendant's name at the time of arrest).

25. 384 U.S. at 477-78. The Court also stated that all voluntary statements are admissible, as the "fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated." *Id.* at 478. For a discussion of the voluntariness issue, *see* notes 18-22 and accompanying text *supra.*

26. *See* Smith, *supra,* note 21 at 706-24. The most litigated issues in the area of "custodial interrogation" concern when the defendant is considered to be in custody and whether he gave the statements sought to be introduced. *Id.* at 706.

27. *See* notes 28-37 and accompanying text *infra.*

28. 391 U.S. 1 (1968).

29. *Id.* at 4-5. The government sought to narrow the scope of *Miranda* by arguing that it was only applicable to the questioning of a suspect who is in custody in connection with the case under investigation. *Id.* at 4. The Court found no substance to such a distinction, and also rejected an argument that tax investigations are immune from the *Miranda* requirements. *Id.*

In a dissenting opinion, Justice White argued that the majority was extending *Miranda,* since the custody and questioning were unrelated and since *Miranda* dealt with a suspect who was thrust into unfamiliar surroundings, and so even though the defendant in *Mathis* was confined, he was in familiar surroundings at the time of interrogation. *Id.* at 6-7 (White, J., dissenting). For a discussion of the importance of the nature of the surroundings, *see* notes 19-21 and accompanying text *supra.*

30. 391 U.S. at 3. While serving a sentence in state prison for an unrelated offense, the defendant was questioned by an Internal Revenue Service Agent regarding allegedly fraudulent tax refund claims. *Id.* at 3 n.2. Oral statements and documents given by the defendant were later used to help convict him of knowingly filing false claims against the government. *Id.* at 3. The government agent never gave the defendant his *Miranda* warnings. *Id.* at 2-3.

31. 394 U.S. 324 (1969).

32. *Id.* at 325-26. In *Orozco,* the defendant was a suspect in a killing and had returned to his boardinghouse to sleep. *Id.* at 325. At about 4:00 a.m., four officers were admitted by an unidentified woman, entered the defendant's bedroom, and began to question him. *Id.* One of the officers testified that from the moment the defendant gave his name he was not free to go but was "under

The *Orozco* Court further held that *Miranda* applies whenever there is a significant deprivation of the suspect's freedom, regardless of the place of interrogation.[33]

In *Oregon v. Mathiason*,[34] the Court interpreted "significant deprivation of freedom" to mean restriction of the suspect's freedom of movement.[35] The *Mathiason* Court refused to extend *Miranda* to a case where the suspect voluntarily went to the police station and was told that he was not under arrest and was free to go at any time.[36] The Court held that "Miranda warnings are required only where there is such a restriction on a person's freedom as to render him 'in custody.' "[37]

In determining whether a suspect is "in custody" for *Miranda* purposes, most courts of appeals have adopted an objective test which requires that the court decide whether the officer did something that would indicate that the suspect was not free to leave at will.[38] As a

arrest." *Id.* Statements made by the defendant were then used to help convict him. *Id.* at 325-26.

33. *Id.* at 327. For a discussion of "custodial interrogation" in *Miranda*, *see* note 21 and accompanying text *supra*.

34. 429 U.S. 492 (1977).

35. *Id.* at 495.

36. *Id.* at 493. In *Mathiason*, a State Police officer investigating a theft had left a note at the defendant's apartment asking him to call. *Id.* When the defendant called the next day, he agreed to meet the officer at the state patrol office that afternoon. *Id.* The officer took the defendant into his office and the defendant confessed after falsely being told that his fingerprints were found at the scene. *Id.* The officer then taped the confession after advising the defendant of his *Miranda* rights. *Id.* at 494.

37. *Id.* at 495. The Court held that *Miranda* is not applicable to a non-custodial situation merely because the questioning takes place in a "coercive environment." *Id.* The Court also stated that the warning requirement is not imposed simply because the questioning takes place in the police station, or because the questioned person is one whom the police suspect. *Id.*

A similar decision was reached in United States v. Beckwith, 425 U.S. 341 (1976). The defendant was read all of his rights, except for his right to have an attorney present, before IRS agents questioned him in his temporary home. *Id.* at 342-43. Following the interview, the defendant allowed the agents to inspect certain records at his place of employment. *Id.* at 343-44. The Court held that the statements made by the defendant were admissible, since *Miranda* does not extend to non-custodial circumstances and the defendant was neither arrested nor detained against his will. *Id.* at 344-45.

38. *See* Smith, *supra* note 21, at 710-14. The advantage of an objective test is that it is "not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question." *Id.* at 713, *quoting* People v. P., 21 N.Y.2d 1, 9, 233 N.E.2d 255, 260, 286 N.Y.S.2d 225, 233 (1967). *See, e.g.*, United States v. Jimenez, 602 F.2d 139 (7th Cir. 1979); Borodine v. Douzanis, 592 F.2d 1202 (1st Cir. 1979); United States v. Hall, 421 F.2d 540 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

The Ninth Circuit has phrased the objective test in the form of a reasonable man standard which requires the court to determine whether a suspect can reasonably believe that he cannot leave freely. United States v. Luther, 521 F.2d 408, 410 (9th Cir. 1975), *citing* Lowe v. United States, 407 F.2d 1391, 1397 (9th Cir. 1969). The factors to be considered under the Ninth Circuit's test are "the language used to summon [the suspect], the physical surroundings of the

result of the application of this test, holdings have emerged from the various circuits that *Miranda* warnings are not necessary: 1) when a suspect is stopped at customs but allowed to go free; [39] 2) when the suspect is free to go even though he is the "focus" of the investigation; [40] 3) when the suspect voluntarily submits to an interview and has the freedom to leave; [41] 4) when the suspect is questioned in an on-the-street encounter; [42] 5) when no interrogation tactics are used; [43] or 6)

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interrogation, the extent to which he is confronted with evidence of his guilt, and pressure exerted to detain him." *Id.*

Other tests which have been advanced to determine whether a defendant is "in custody" for *Miranda* purposes include the focus test and the subjective test. Smith, *supra* note 21, at 707-11. Under the focus test, the court looks to see whether the investigation has switched from a general inquiry of an unsolved crime, into an investigation centered on a particular suspect. *Id.* at 707. *See* United States v. Phelps, 443 F.2d 246 (5th Cir. 1971). The Supreme Court, however, has stated that focus alone may not be enough to establish custody. United States v. Beckwith, 425 U.S. 341, 347 (1976). *See also* note 40 *infra.* For a further discussion of *Beckwith, see* note 37 *supra.*

Under the subjective test, the suspect's belief as to whether he is "in custody" is controlling. Smith, *supra,* at 711. The subjective test is based on the view that "the person who honestly but unreasonably thinks he is under arrest has been subjected to precisely the same custodial pressures as the person whose belief in this regard is reasonable." *Id., quoting* LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond,* 67 MICH. L. REV. 39, 99 (1968). *See also,* Rothblatt & Pitler, *Police Interrogation: Warnings and Waivers — Where Do We Go From Here?,* 42 NOTRE DAME LAW. 479, 485 (1968).

39. United States v. Luther, 521 F.2d 408 (9th Cir. 1975). The defendant was stopped at customs and an inspection revealed 3,600 laetrile capsules in her car trunk. *Id.* at 409. The customs agent seized the capsules and allowed the defendant to leave. *Id.* at 410. She was arrested at her home the next day. *Id.*

40. United States v. Hall, 421 F.2d 540 (2d Cir. 1969), *cert. denied,* 397 U.S. 990 (1970). A bank robbery witness' description of the robber's car led police to the defendant, who was then interviewed at his apartment. 421 F.2d at 541-42. The court held that focus alone did not trigger a need for *Miranda* warnings. *Id.* at 543.

The Supreme Court reached a conclusion similar to the Second Circuit's in United States v. Beckwith, 425 U.S. 341, 347 (1976). For a discussion of *Beckwith, see* note 37 *supra.*

41. United States v. Freije, 408 F.2d 100 (1st Cir.), *cert. denied,* 396 U.S. 859 (1969). The defendant was a suspect in a case involving the interstate transportation of stolen automobiles. 408 F.2d at 101. He was voluntarily interviewed at the police station and was free to leave at any time. *Id.* at 102-03.

42. United States v. Jimenez, 602 F.2d 139 (7th Cir. 1979). After trailing the defendant for 10 miles, the police stopped her and asked what she had in her trunk. *Id.* at 141. The court held that the absence of any physical or verbal threats, or any other special circumstances, prevented the creation of a custodial atmosphere. *Id.* at 144.

43. United States v. Gibson, 392 F.2d 373 (4th Cir. 1968). The defendant was questioned in front of a tavern concerning a stolen vehicle. *Id.* at 375. The court held that *Miranda* was inapplicable since there was no record of any "element of accusation, deception, suggestion, or other tactics calculated to overawe, like those condemned in *Miranda.*" *Id.* at 376. For a discussion of the coercion existing in *Miranda, see* notes 19-21 and accompanying text *supra.*

when the overall atmosphere is one of cooperation and not of compulsion.[44] In each case, the controlling factor was that the suspect had the freedom to leave and could thereby avoid any compulsion to speak against his will.[45]

The Third Circuit has recognized that the term "custodial interrogation" as it applies to pre-arrest questioning of suspects for *Miranda* purposes is not amenable to precise definition.[46] The court has explained that each case must be decided on its own facts,[47] but has, in scrutinizing those facts, utilized an objective test which evaluates whether the government restrained the suspect's freedom in some meaningful way.[48] In applying the test in the absence of an actual arrest, the court has stated that, "something must be done or said by the authorities, either in their manner of approach or in the tone or extent of their questioning which indicates that they would not have heeded a request to depart or to allow the suspect to do so."[49] In *Government of Virgin Islands v. Berne*,[50] the Third Circuit found *Miranda* to be inapplicable to questions addressed to a suspect not under arrest and who was permitted to go home following the questioning.[51] Similarly,

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44. United States v. Harris, 611 F.2d 170 (6th Cir. 1979). FBI agents went to the defendant's motel room and asked him if he had a gun, at which time the defendant showed them where he kept a loaded pistol. *Id.* at 171. The court held that *Miranda* was inapplicable since "[t]he overall atmosphere . . . was clearly one of cooperation and not one of compulsion." *Id.* at 173.

45. For a discussion of the importance of the suspect's being free to leave, *see* notes 19-37 and accompanying text *supra*.

46. United States v. Clark, 425 F.2d 827, 832 (3d Cir.), *cert. denied*, 400 U.S. 820 (1970). The court stated that "an exact definition for 'custodial interrogation' is, by its nature, an impossibility." 425 F.2d at 832. The *Clark* court held that a person detained on the street for purposes of an inquiry concerning a minor violation, but not placed under arrest, is not entitled to *Miranda* warnings. *Id.* For the *Miranda* Court's discussion of "custodial interrogation," *see* notes 20-21 and accompanying text *supra*.

47. United States v. Clark, 425 F.2d 827, 832 (3d Cir.), *cert. denied*, 400 U.S. 820 (1970).

48. Steigler v. Anderson, 496 F.2d 793, 798 (3d Cir.), *cert. denied*, 419 U.S. 1002 (1974), *citing* United States v. Jaskiewicz, 433 F.2d 415, 419 (3d Cir. 1970). The *Steigler* court stated that in the absence of restraint under the objective test, the inherent pressures which *Miranda* warnings were intended to neutralize simply do not exist. 496 F.2d at 798. *See generally* Y. KAMISAR, "CUSTODIAL INTERROGATION" WITHIN THE MEANING OF MIRANDA, CRIMINAL LAW AND THE CONSTITUTION 335-83 (1968).

For an endorsement of the objective test, *see* Lederer, Miranda v. Arizona — *The Law Today*, 78 MIL. L. REV. 107, 130-33 (1978). For a discussion of the use of the objective test among the other circuits, *see* notes 38-45 and accompanying text *supra*.

49. Steigler v. Anderson, 496 F.2d 793, 799 (3d Cir.), *cert. denied*, 419 U.S. 1002 (1974), *quoting* United States v. Hall, 421 F.2d 540, 544-45 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

50. 412 F.2d 1055 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).

51. 412 F.2d at 1057. The police had been informed by a rape victim that her dress and undergarments were in the trunk of her assailant's car. *Id.* Her description led police to the defendant, who was soon questioned at his home.

in *Steigler v. Anderson*,[52] the Third Circuit held that an arson suspect was not entitled to *Miranda* warnings when he was questioned four separate times before being charged,[53] since he was always free to leave.[54]

Against this background, Chief Judge Seitz began his analysis in *Mesa* by examining the precepts underlying the *Miranda* rule.[55] He recognized that the *Miranda* warnings were not intended to unduly interfere with a proper system of law enforcement or to hamper the police's traditional investigatory functions.[56] The Chief Judge then stated that in deciding whether there has been a "custodial interroga-

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Id. He gave the police the clothes and went to the police station with the two officers who had questioned him. *Id.* The defendant was not arrested or restrained in any way and was later permitted to return to his home alone. *Id.* He was first given his *Miranda* rights when he arrived at the police station. *Id.* The defendant was later arrested when he and his father attempted to see the victim at her hotel. *Id.* At trial, defense counsel objected to the introduction of the victim's clothes on the grounds that the defendant had not been given his *Miranda* rights. *Id.*

The court focused on the defendant's freedom of action and on the fact that he was not "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." *Id.* at 1059, *quoting* Miranda v. Arizona, 384 U.S. at 457. The court contrasted the defendant's situation with that of Miranda's, and found the fact that Miranda was held incommunicado in a police interrogation room to be significant. 412 F.2d at 1059. The court also found "no evidence of the application of force or intimidation, physical or psychological, actual or implied." *Id.* at 1060. It also held that "the mere presence of the police at the subject's home cannot be equated, *per se*, with the deprivation of significant freedom of action with which the Court in *Miranda* dealt." *Id.* at 1059-60.

52. 496 F.2d 793 (3d Cir.), *cert. denied*, 419 U.S. 1002 (1974).

53. 496 F.2d at 795. Following a fire in the defendant's home, evidence of arson was uncovered and the defendant became one of the suspects. *Id.* at 794-95. The defendant was then interviewed by the police on four separate occasions within five days of the time of the fire. *Id.* at 795. The defendant was not read his *Miranda* rights before any of the four interrogatories. *Id.*

54. *Id.* at 800. The district court listed five factors which the Third Circuit affirmed as being significant for purposes of determining that there was no custodial interrogation:

> (1) There was a complete absence of restraint of petitioner's liberty . . . ;
>
> (2) The interrogations were routine and courteous in character;
>
> (3) There [was] no evidence that the investigation had "focused" on petitioner . . . ;
>
> (4) Petitioner was a young and intelligent man, a college graduate, and [was] not to be easily cowed or intimidated by police presence;
>
> (5) The times of the interrogations seemed to be reasonable, subject to petitioner's convenience and not unduly prolonged.

Id., quoting Steigler v. Anderson, 360 F. Supp. 1286, 1291 (D. Del. 1973).

55. 638 F.2d at 582. The court again recognized that "custodial interrogation" is not susceptible of an exact definition, so each situation must be analyzed on a case-by-case basis. *Id.* at 584. *See* note 46 and accompanying text *supra*. For a discussion of the precepts underlying *Miranda*, *see* notes 17-22 and accompanying text *supra*.

56. 638 F.2d at 584. *See* notes 23-25 and accompanying text *supra*.

tion," two distinct inquiries are necessary.[57] First, the court must determine whether the suspect was "in custody" for *Miranda* purposes.[58] Second, if custody is found to exist, the court must determine whether the suspect was interrogated.[59]

In analyzing the custody issue, Chief Judge Seitz first stated that *Miranda* warnings are required in order to protect a suspect from the compulsion inherent in an in-custody interrogation.[60] Concentrating on the Supreme Court's perceived dangers of the custodial interrogation process, Chief Judge Seitz stated that the warnings were designed for situations in which the police can restrain the suspect, subject him to their questioning, and apply whatever psychological techniques they think will be most effective.[61]

Chief Judge Seitz next distinguished Mesa's situation from that of *Miranda*.[62] He found that the key differences between the two situations were: 1) the police did not have immediate control over Mesa's actions; [63] 2) the Agent was not alone in a room with Mesa such that all distractions were eliminated; [64] and 3) the Agent could not control

57. 638 F.2d at 584-85. The court stated that the "custody" issue is to be decided first, with the inquiry regarding "interrogation" arising once the suspect is in custody. *Id.* at 585.

58. *Id.* For a discussion of "custody," *see* notes 19-37 and accompanying text *supra.*

59. 638 F.2d at 585. Since Chief Judge Seitz held that Mesa was not in custody within the meaning of *Miranda,* he did not reach the question of whether the Agent's conversation with Mesa constituted "interrogation." *Id.* at 589. For a discussion of "interrogation," *see* note 19 and accompanying text *supra.*

60. 638 F.2d at 585. The court stated that the *Miranda* Court had viewed the issuing of the warnings as necessary to ensure that any statement is the product of free choice. *Id.* Chief Judge Seitz also emphasized that the fact that in-custody interrogation takes place in private was central to the *Miranda* decision. *Id.* He then reviewed the Court's discussion of techniques in police interrogation manuals, which stress the importance of isolation of the suspect in a police-dominated atmosphere. *Id.* For a further discussion of the need for the warnings, *see* notes 19-21 and accompanying text *supra.*

61. 638 F.2d at 585-86. The court stated that "the key aspect of the custodial setting as described in *Miranda* is the isolation of the suspect in a room that is dominated by the law enforcement officials who will interrogate him." *Id.* The court also noted that in such a situation it is more feasible for the police to give the suspect the warnings, since they need not be concerned that giving the warnings may effect the suspect's desire to cooperate with the police. *Id.* at 586. *See* notes 17-22 and accompanying text *supra.*

62. 638 F.2d at 586.

63. *Id.* Chief Judge Seitz stated that the FBI agents

> could not compel Mesa even to listen to any questions they might want to ask, much less subject him to the interviewing techniques or 'tricks' that concerned the *Miranda* Court. They had no power to handcuff him or use other reasonable means to confine him in such a manner that he had no choice but to listen to questioning.

Id.

64. *Id.* Chief Judge Seitz found it important that Mesa could terminate the phone conversation at any time. *Id.*

the substance of the conversation with Mesa.[65] The Chief Judge, therefore, concluded that the FBI did not have the same power to wear down Mesa's will that the *Miranda* Court believed exists in a custodial setting.[66]

The *Mesa* court rejected the contention that the presence of officers surrounding the motel established custody by depriving Mesa of his freedom in a significant way.[67] The court stated that the *Miranda* Court's focus on the suspect's freedom to come and go must be considered in conjunction with the concerns of the custody requirements.[68] Thus, once a suspect was within the immediate control of the police, the proper inquiry to determine whether he is in custody would be to ask if he were free to leave.[69] However, the court stated that this inquiry is not necessary until the suspect is isolated in a police-dominated atmosphere where the police have immediate control over him.[70] Chief Judge Seitz found that since the FBI never attained immediate control over Mesa during the conversation, it was unnecessary for the court to decide whether he was free to leave.[71] Having thus concluded that Mesa was not in custody, the Chief Judge found it unnecessary to discuss the interrogation issue.[72] Chief Judge Seitz did, however, limit

65. *Id.* Mesa controlled the direction of the conversation and chose the topics of discussion. *Id.* The only indication in the conversation that the Agent possibly attempted to direct the conversation came where he stated: "Tell me what happened yesterday. What was the provacation?" *Id.* at 586 n.3. This was in direct response to Mesa's statement: "What happened yesterday was a provocation. It was a provocation because I am not a criminal. I am not a criminal. Because I didn't hurt anybody until I went to Viet Nam." *Id.* at 586 n.3.

66. *Id.* at 586. Chief Judge Seitz emphasized that, unlike a suspect in a custodial setting, Mesa retained the psychological advantage of being able to "call the shots" to some degree. *Id.* at 587. Consequently, he concluded that Mesa was not in "custody" within the meaning of *Miranda*. *Id.*

67. *Id.*

68. *Id.* For a discussion of the concerns of the custody requirement, *see* notes 19-37 and accompanying text *supra*.

69. 638 F.2d at 587. The court stated: "The *Miranda* Court's description of the custodial setting demonstrates that, at a minimum, the police must have immediate control over the suspect." *Id.*

For a further discussion of the freedom to leave analysis, *see* notes 19-37 and accompanying text *supra*.

70. 638 F.2d at 588. According to Chief Judge Seitz, until the police have immediate control over the suspect, the potential for intimidation is not present. *Id.*

71. *Id.*

72. *Id.* at 589. For a general discussion of the interrogation issue, *see* note 19 *supra*.

Chief Judge Seitz also found it unnecessary to discuss the voluntariness of Mesa's statements, since Mesa never claimed that his statements were involuntary. 638 F.2d at 589, *citing* Davis v. North Carolina, 384 U.S. 737, 741-42 (1966) (when the issue of voluntariness is raised on appeal, the court must examine the entire record and make an independent determination of that ultimate issue). For a general discussion of the voluntariness issue, *see* notes 18-22 and accompanying text *supra*.

the court's holding to the particular factual situation involved in *Mesa*.[73]

In a concurring opinion, Judge Adams, reversing the order in which Chief Judge Seitz considered the issues,[74] concluded there was no interrogation,[75] thus finding it unnecessary to reach the custody issue.[76] Judge Adams based his conclusion on the fact that the Agent acted primarily as a listener, not a questioner,[77] and that Mesa made the statements of his own volition.[78] Recognizing the district court's finding that the Agent had a secondary purpose of gathering possible evidence, Judge Adams stated that it would be impractical and counterproductive to require *Miranda* warnings in a sensitive situation such as the one in *Mesa*.[79] Finally, Judge Adams stated that although such statements

73. 638 F.2d at 589. Chief Judge Seitz recognized that in some situations it would be unfair to admit statements made by a suspect under the conditions similar to those in the present case. *Id.* The *Mesa* court merely concluded that *Miranda* warnings are not a prerequisite to the admission into evidence of statements made by an armed suspect who is not within the immediate control of the police. *Id.*

Recognizing that the main principle behind *Miranda* is that a suspect should not be compelled to speak against his will, Chief Judge Seitz also stated that any statements must be closely scrutinized for voluntariness, even if *Miranda* warnings are given. *Id.* Consequently, if the police use psychological trickery or other forms of overreaching to induce a suspect to incriminate himself, the statements can still be attacked on the ground that they were compelled in violation of his Fifth Amendment rights. *Id.* For a general discussion of voluntariness, *see* notes 18-22 & 25 and accompanying text *supra*. For a discussion of the principles behind *Miranda*, *see* notes 17-22 and accompanying text *supra*.

74. 638 F.2d at 589 (Adams, J., concurring). Judge Adams' order of discussing the issues appears to be contrary to the clear implication of Rhode Island v. Innis, 446 U.S. 291 (1980). In *Innis*, the Supreme Court held that "the *Miranda* safeguards come into play whenever a person *in custody* is subjected to either express questioning or its functional equivalent." *Id. at* 300-01 (emphasis added). For a further discussion of *Innis* and the question of "interrogation" in *Miranda*, *see* note 19 *supra*.

75. 638 F.2d at 589 (Adams, J., concurring).

76. *Id.* at 590-91 (Adams, J., concurring).

77. *Id.* at 589-90 (Adams, J., concurring). Judge Adams noted that the conversation was nonadversarial and noninquisitorial in nature. *Id.* at 590 (Adams, J., concurring). In his view, Mesa was not "subjugated to the will of the examiner," which was the concern expressed in *Miranda*. *Id.* He saw the Agent's purpose in the conversation as one of keeping Mesa from dwelling on thoughts of suicide and of achieving a peaceful resolution of the confrontation. *Id.* For a further discussion of the Agent's purpose in the conversation, *see* notes 4-7 and accompanying text *supra*.

78. 638 F.2d at 590 (Adams, J., concurring). For a further discussion of the voluntariness requirement, *see* notes 18-22, 25 & 72 and accompanying text *supra*.

79. 638 F.2d at 590 (Adams, J., concurring). Judge Adams reasoned that negotiation is usually dependent on the negotiator establishing an atmosphere of trust and understanding with the suspect and by giving *Miranda* warnings an adversarial atmosphere is created from the outset. *Id.* In his view, "law enforcement personnel should not be forced to make a pressured judgment as to whether reading the *Miranda* warnings would deter the suspect from talking, when it is the chance to engage the suspect in a dialogue that holds the main hope for saving lives." *Id.*

were admissible, law enforcement officials should refrain from relying on them, since future suspects may become more reluctant to negotiate with the police if they fear statements made will be used at trial to incriminate them.[80]

In a dissenting opinion, Judge Weiner analyzed the principles behind the *Miranda* rule[81] and concluded that the deprivation of Mesa's freedom of action was controlling.[82] He disagreed with the distinctions drawn by Chief Judge Seitz concerning whether or not Mesa was in "custody" for *Miranda* purposes,[83] and concluded that Mesa was under the direct and immediate control of the authorities.[84] Judge Weiner also stated that the fact that Mesa could terminate the conversation was unimportant.[85] After deciding that Mesa was in custody, Judge Weiner further concluded that Mesa had been interrogated, since the Agent did have the secondary purpose of obtaining information and he

80. *Id.* at 591 (Adams, J., concurring). In Judge Adams' view, use of the statements may indicate a breach of trust in the view of future suspects, thus deterring them from trusting a police negotiator in a delicate situation similar to one in the present case. *Id.*

81. 638 F.2d at 593-94 (Weiner, J., dissenting). For a discussion of the principles behind *Miranda, see* notes 17-21 and accompanying text *supra.*

82. 638 F.2d at 594 (Weiner, J., dissenting). Finding that "the initial question to be considered is whether Mesa was 'in custody or otherwise deprived of his freedom of action' during the conversation with [the Agent]," Judge Weiner held that the "seige atmopshere" at the scene indicated that Mesa was restrained in his freedom of movement. *Id.* at 593 (Weiner, J., dissenting). Judge Weiner also found that the lack of an arrest was unimportant since the Third Circuit had previously held that in the absence of actual arrest, something must be said or done by the authorities which indicates that they would not have heeded a request to depart or to allow the suspect to do so. *Id.* at 594 (Weiner, J., dissenting). See note 49 and accompanying text *supra.*

83. 638 F.2d at 594 (Weiner, J., dissenting). Judge Weiner stated that Chief Judge Seitz's opinion was based on the view that the police lacked "immediate" control over Mesa, since no officers were actually present in the motel room with Mesa. *Id.* For a discussion of Chief Judge Seitz's view, *see* notes 67-71 and accompanying text *supra.*

84. 638 F.2d at 594 (Weiner, J., dissenting). Judge Weiner found it significant that Mesa was alone, locked inside of a motel room with only one exit, and that the motel was surrounded by over 20 law enforcement officials who had a warrant for his arrest. *Id.* He argued that Mesa was in a very real sense under the direct and immediate control of the authorities, as he could have only left the room in three possible ways: "dead, injured and under arrest, or uninjured and under arrest." *Id., quoting* United States v. Mesa, 487 F. Supp. at 562. Consequently, Judge Weiner concluded that "the situation at the motel was replete with the very same dangers to Mesa's Fifth Amendment rights as are present in a station-house custody situation." 638 F.2d at 594 (Weiner, J., dissenting). For a discussion of the distinctions drawn by Chief Judge Seitz, *see* notes 62-66 and accompanying text *supra.*

85. 638 F.2d at 595 (Weiner, J., dissenting). Judge Weiner disagreed with Chief Judge Seitz on the importance of this factor since he believed that the overall "balance of power" was still with the authorities surrounding the motel. *Id.* Also, any suspect can terminate a conversation with law enforcement officials by simply refusing to speak to his interrogators. *Id.* Judge Weiner also stated that the fact a suspect has the ability to terminate questioning does not abrogate his rights. *Id.*

did, in Judge Weiner's view, attempt to direct the course of the conversation.[86]

It is submitted that the *Mesa* court, in denying the motion to suppress, correctly interpreted and applied *Miranda*.[87] The evils of in-custody interrogation which first led the Supreme Court to develop the *Miranda* warnings[88] were not present in the instant case.[89] Mesa was not held incommunicado, thrust into an unfamiliar environment, or run through menacing police interrogation procedures.[90] Mesa was barricaded in his own motel room and allowed the FBI to communicate with him at his own discretion;[91] thus, he was not subject to either physical or psychological coercion similar to that mentioned in *Miranda*.[92]

It is also submitted that, as Chief Judge Seitz correctly indicated, the fact that Mesa was not free to leave the area did not create custody for *Miranda* purposes.[93] In each case before the Supreme Court where

86. *Id.* at 595-96 (Weiner, J., dissenting). Judge Weiner concluded that the Agent's comments appeared calculated to bring about a peaceful end to the standoff and to elicit information about the shootings. *Id.* at 596 (Weiner, J., dissenting). He also found that the Agent did direct express questions about the shooting to Mesa. *Id. But see* note 65 and accompanying text *supra.*

Judge Weiner also found that the Agent's statements fell squarely within the Supreme Court's definition of interrogation as "not only express questioning, but also . . . any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 638 F.2d at 595 (Weiner, J., dissenting), *quoting* Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). Judge Weiner reasoned that the Agent knew Mesa would make incriminating responses to his questions since the Agent had established a relationship of trust, which, coupled with Mesa's fear and confusion, increased his susceptibility to persuasion. 638 F.2d at 596 (Weiner, J., dissenting).

87. For a discussion of *Miranda, see* notes 16-25 and accompanying text *supra.*

88. For the evils surrounding the *Miranda* case, *see* notes 19-21 and accompanying text *supra.*

89. For a discussion of the facts of *Mesa, see* notes 2-9 and accompanying text *supra;* notes 90-92 and accompanying text *infra.*

90. 638 F.2d at 583-84. The *Miranda* Court stated that the potential for compulsion in each of the four cases was "forcefully apparent," since in each case, "the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." 384 U.S. at 457. The *Miranda* Court stressed the importance of privacy, citing police manuals which state that the "principal psychological factor contributing to a successful interrogation is *privacy* — being alone with the person under interrogation." *Id.* at 449, *quoting* F. INBAU & J. REID, *supra* note 21, at 1 (footnote omitted). For a discussion of *Miranda, see* notes 16-25 and accompanying text *supra.*

91. 638 F.2d at 583-84. In each case in *Miranda,* the defendants were at the police station and were forced to listen to the police officers' questions. 384 U.S. at 491-99; note 16 *supra.* The fact that Mesa really controlled the communications is indicated by the fact that although the Agent wanted to keep the conversation going, Mesa took breaks whenever he so desired. 638 F.2d at 586.

92. For a discussion of the coercion present in *Miranda, see* notes 19-21 and accompanying text *supra.*

93. *See* notes 67-71 and accompanying text *supra.*

Miranda has been applied there was an existing possibility that the police could use either physical force or the psychological techniques specified in the *Miranda* opinion [94] to compel a suspect to speak against his will.[95] In the present case the FBI could not even force Mesa to listen to their questions, thus indicating a lack of immediate control over him.[96] In such a situation, the fact that Mesa's movement to and from the area was restricted is unimportant, since the FBI still lacked the power to wear down his will that was present in *Miranda*.[97]

The analysis of the *Mesa* court, it is also contended, reflects a desire by the Third Circuit to abstain from unnecessarily hampering law enforcement officials.[98] By not requiring the warnings, the court does not force police officers to decide whether to give an armed and barricaded suspect his *Miranda* rights before resolving the situation at hand.[99] In reaching such a decision, it is contended, the court eases the burden on the police and conforms with the expressed desires of the *Miranda* Court.[100]

In considering the impact of *Mesa,* it is evident that the Third Circuit is not willing to extend the principles of *Miranda* when it may operate to unduly hamper law enforcement officials.[101] It is suggested that this decision restricts the scope of *Miranda* to situations in which protection of a suspect's constitutional rights is most necessary — where the police have direct and immediate control over the suspect and have the greatest opportunity to compel him to speak against his will.[102]

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94. For a discussion of the techniques for coercion in *Miranda, see* notes 19-21 and accompanying text *supra.*

95. In *Miranda* and the three accompanying cases, each suspect was either arrested or at the police station, and was interrogated in private. *See* 384 U.S. at 491-99; note 16 *supra.* In Mathis v. United States, the suspect was interviewed while he was already in prison. *See* 391 U.S. at 3; notes 28-30 and accompanying text *supra.* In Orozco v. Texas, the suspect, though not formally arrested, was questioned while surrounded by the police in his bedroom. *See* 394 U.S. at 325; notes 31-33 and accompanying text *supra.*

96. 638 F.2d at 586. Since Mesa had the ability to hang up the phone, it is clear he had the ability to prevent any communications, at least until the situation was resolved.

97. *See* notes 62-66 and accompanying text *supra.*

98. 638 F.2d at 588-89. *See* note 56 and accompanying text *supra.*

99. 638 F.2d at 588. It could be argued that the police are not put in a difficult situation, since by choosing not to give a suspect his rights the police can still settle the situation, but must simply refrain from asking any questions. However, a choice is still involved in situations where the suspect might be ready to make a statement while he is still barricaded in his room. *Id.*

100. *Id.* at 588-89. For a discussion of the desires of the *Miranda* Court, *see* notes 18-25 and accompanying text *supra.*

101. 638 F.2d at 588. The court stated that "extending *Miranda* to this situation would put law enforcement officials to a delicate and difficult choice." *Id.*

102. *See* notes 17-21 & 60-66 and accompanying text *supra.*

It is also suggested that the court's decision will not open the way for great abuses of suspects' rights by the police.[103] In some situations, an armed and barricaded suspect will be under such strain that his statements will be considered to be involuntary, and therefore, inadmissible.[104] In other situations, it may not be feasible for the police negotiator to try to direct the conversation through questions, as the suspect may be hostile toward any attempt to discover information concerning his actions.[105]

In conclusion, it is submitted that the *Mesa* court's decision adequately provides protection for suspects' constitutional rights and also avoids placing unnecessary burdens on law enforcement officials. It is contended that even though the court has restricted the scope of *Miranda* to cases where the police have direct and immediate control of the suspect, the Third Circuit has provided guidance to other courts as to how the principles behind the *Miranda* decision can be applied without putting added pressures on law enforcement officials.

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103. For a discussion of the abuses perceived by the *Miranda* Court, *see* notes 19-21 and accompanying text *supra.*

104. For a discussion of the voluntariness issue, *see* notes 18-22, 25 & 72 and accompanying text *supra.*

105. 638 F.2d at 588. As Chief Judge Seitz stated in his opinion: "[I]mplicit in the *Miranda* holding is the notion that the police are in a position to give a suspect his warnings." *Id.* However, when it is first necessary to establish a relationship of trust, such warnings may not be feasible. *Id.* at 588-89.

Another factor which could prevent police abuses is the breach of trust argument posited by Judge Adams in his concurring opinion. For a further discussion of this argument, *see* note 80 and accompanying text *supra.*